IN THE

Supreme Court of the United States

October Term 1899.

No. 201.

H. C. OSBORNE, ET. AL.,
Appellants,
vs.
SAN DIEGO LAND AND TOWN COMPANY,
Appellee.

BRIEF OF APPELLEE.

STATEMENT.

We have read the very able and exhaustive brief of Counsel for appellant with great interest and pleasure. As a dissertation on abstract questions of law it is worthy of careful study and consideration by those who desire to arrive at a just solution of the many serious and important questions relating to the rights of water companies and their consumers in California. But most of the questions so ably discussed by counsel are not presented by the record in this case directly or indirectly, and are purely theoretical, and for that reason only tend to confuse the one and only question here presented for review. We shall not attempt to follow counsel in their elaborate and extended argument upon many of the important questions first raised by their brief for the purpose of discussing them, for the reason that no decision of them is called for in this action and none could very well be given because they are mere theories of the most visionary and impracticable kind. There is but one question presented by this appeal, and that a very simple one, viz.:

"*Has a water company, where rates have not been*

fixed by the Board of Supervisors the right and power to change and fix its own annual rates."

This question, we believe we will be able to show, is not affected in the least by the other questions so elaborately discussed by counsel; whether a valid contract can be made by and between a water company and a consumer of water for a "*water right*" or whether a water right acquired by a water consumer is an easement on the system of the company or not. We may say at the outset that we agree with counsel for appellant that a water company may legally contract with a water consumer for a water right to water to be applied to and made appurtenant to lands owned by such consumer, and that such water right, so acquired, and applied to lands, is the perpetual right to receive the amount of water covered by such water right and use it upon the lands to which it has thus become appurtenant. And, further, that such right vests in the consumer the right to prevent the company from selling other water rights, or supplying water, beyond the supply of the company, or duty of its system, and thereby diminishing the quantity of water to which such consumer is entitled under his water right.

Therefore, the sole and only question between us is this:

The consumer having acquired his water right *on what terms* is he entitled to receive the water under that water right?

The appellants concede that they cannot demand the water for nothing because they have acquired the water right. But they contend that they are only bound to pay such rates as will meet the operating expenses of the system and keep it in repair, and not such as will return the company any profit. The position of the appellee is that the water right acquired by the consumer vests in him the perpetual and preferred right to the water *on the payment of the annual rates fixed and established as provided by law*

that such rates must be fixed as will yield to the company a reasonable return on the value of its plant and system; that until the consumers or other citizens of the county have caused the rates to be fixed by the board of supervisors, as provided by law, the company itself may establish and re-establish the rates, subject always to the right of twenty-five of the consumers or other citizens of the county to fix and establish such rates. The court below so held.

Lanning v. Osborne, 76 Fed. Rep., 319.

But the court went farther, and decided that the water company had no power, under the constitution and laws of the state of California, to contract with a consumer for a water right and that the consumer was entitled to demand and receive the water on payment or tender of the annual rates, fixed as provided by law.

The decision of this question was not necessary to the decision of the case and was not raised by either party to the suit. If the court below was right in this conclusion its determination that a contract for a water right did not affect the liability of the consumer to pay the annual rates, or the amount of such rates is unquestionably right. But such determination, as we think we shall show, was not necessary to the ultimate conclusion reached by the court. Whether a contract for a water right was valid or not has nothing to do with the liability of the consumer to pay annual rates or the amount to be paid.

Again, counsel have presented their brief on the theory that a company and its consumers may fix and establish the *annual rates* by contract between themselves. We shall maintain that this cannot be done under the laws of California and farther, that it is entirely immaterial in this case whether it can be legally done or not because no such contract was made or attempted to be made between the parties to this suit, or any of them. In every instance where

water rights were conveyed by contract it was agreed, in substance, that the owner of the water right thus acquired was to pay, in addition to the amount paid by him for the water right, all annual water rates and charges for the water fixed by the company as allowed by law.

Record, pp. 21, 22.

Lanning v. Osborne, pp. 326, 327.

These contracts not only recognized the legal right of the company to fix, establish and change its water rates, but in express terms agreed to pay the annual rates fixed by the company in addition to the amount paid for the water right.

Again, it must not be overlooked that only a small number of the defendants contracted, or paid for water rights. Most of them bought their lands from the company, with water, and thus acquired the water right by the application of the water to their lands; many of them, owning lands not purchased from the company, acquired water rights by the supply of water to their lands by the company without the payment of anything for the water right.

That a water right, vesting in the land owner the right to the perpetual use of the water on his lands, may be acquired, is expressly provided by statute in California.

Civil Code, Cal., Sec. 552.

Therefore, whatever may be said in favor of the small number of defendants that paid anything for their water rights, in respect of their claim to have water supplied to them at reduced annual rates because they paid something for their water rights, there can be no pretense that any such claim can prevail as to those defendants that obtained their water rights without any consideration. And as to such defendants as did pay for their water rights, no such claim can be successfully made for them, as above stated, because they expressly agreed to pay the rates fixed by the company, in addition to the amounts paid by them for their

water rights and because they are bound to pay such rates independently of any such contract.

We shall maintain, therefore:

1. That the amount paid for a water right is paid for that preferred right to the perpetual use of the water *at the annual rates fixed as provided by law.*

2. That in this case no contract relieving the consumers from their statutory liability was made, but the contracts all recognize such liability and confirm it in terms.

3. That the company in the absence of action by the supervisors has the right and power to establish, change and re-establish its own rates, subject always to subsequent action by such board.

4. That no contract of the parties or representations of the company can have the effect to modify the statutory mode of fixing the rates, or abrogate the power of the company or the supervisors to fix such rates.

5. That if the company establishes unreasonable or unsatisfactory rates the only and exclusive remedy is an application to the board of supervisors to establish rates as provided by the statute.

ARGUMENT.

WHAT RIGHT WAS VESTED IN THE DEFENDANTS BY THE ACQUISITION OF A WATER RIGHT?

Assuming, for the purposes of this case, notwithstanding the decision of the court below to the contrary, that there is such a thing as a water right, subject to sale and conveyance by a water company selling and distributing water to the public, the first question to be considered is what right is vested in the consumer by the acquistion of this right from the company, and what effect does its acquisition have

upon the duty or liability of the consumer to pay the annual rates for the water fixed as provided by law.

Shorn of the refinements and subtleties of the argument of counsel for the appellant, their position is simply this: The consumer by purchasing, or otherwise acquiring a water right to a part of the water held by the company for sale and distribution, becomes the *owner* of that proportion of the *system* of the company that his water right bears to the whole amount of the water the company is able to supply by its system, and that, when water rights have been acquired for all of the water the system can supply the consumers *own the whole system*, and, therefore, by purchasing the water right the consumer becomes a joint owner of the system and is not bound to pay rates such as will return any compensation for the use of the plant or the water, but only such rates as will keep the plant, *the property of the consumers*, in repair and operate it.

Counsel may sugarcoat this claim, and conceal its effect by calling the right an "easement" or "servitude," or what not, but that is their claim plain and simple. And the amount of argument and refinements and subtleties counsel have resorted to to sustain this most remarkable and hitherto unheard of position, that must overturn and abrogate the constitutional and statutory provisions in this state, enacted for the very purpose of protecting the consumers of water by giving the state power to regulate the price at which water shall be furnished by water companies in their long and labored brief, is appalling.

As opposed to this contention of counsel we maintain that a water right is the preferred and perpetual right of a consumer to have a certain quantity of water supplied to his lands *at the annual rates fixed as provided by law* and that the acquisition of that water right has no effect whatever on

the liability of the consumer to pay the annual rates, or the amount to be paid.

In this case, as we have said in our opening statement, there are three classes of consumers taking water from the system of the appellee. One class bought land from the company, with water attached, without buying a water right; another class bought and paid for a water right, and still another class obtained a water right without paying any consideration therefor, directly or indirectly, by having the water supplied to their lands.

The contention of counsel is that the small number of consumers who bought water rights are not bound to pay rates that will pay the company any profit, that the law of the state requires that all annual rates shall be uniform, and therefore, *none* of the consumers can be charged with such rates.

The law does not contemplate, nor will it countenance, a doctrine so utterly unjust and unreasonable. The code of the state provides:

"Whenever any corporation, organized under the laws of this state, furnishes water to irrigate lands which said corporation has sold, the right to the flow and use of said water is and shall remain a perpetual easement to the land so sold, *at such rates and terms as may be established by said corporation in pursuance of law.* And whenever any person who is cultivating land, on the line and within the flow of any ditch owned by such corporation, has been furnished water by it, with which to irrigate his land, such person shall be entitled to the continued use of said water, upon the same terms as those who have purchased their land of the corporation."

Civil Code of Cal., Sec. 552.

This section was in force when the present constitution was adopted and is still in force.

It will be seen that when water is once supplied to land the right thereto, or the "water right," at once attaches and becomes appurtenant to the land, and the right is to the

continual and perpetual use of the water "*at such rates and terms as may be established by said corporation in pursuance of law.* The appellants' rights, and their interest in the appellee's plant, are clearly defined by this statute, and are easily understood. It is the simple right to the perpetual flow of the water through the company's system, coupled with the obligation, on the part of the company, to keep its system in such condition and repair as may be necessary to supply the water. It may be called an easement, as it is called in the section cited, or what not. There is nothing in the name. That is their right, plain and simple. But it makes no kind of difference in this case what it is. It is a right that is conditioned upon paying an annual rental or rates for the water furnished; or, if counsel prefer it, for the services of the company, and the use and wear and tear of its plant in supplying the water. *And this rate is the sole and only thing in controversy in this case.* Therefore, all of their fine-spun theories may be important in an educational way, but the question as to the exact nature of the rights of the appellants and the corresponding duties of the company, are wholly immaterial and confuse rather than aid in arriving at an intelligent and just conclusion upon the real and only question presented by the issues. For this reason, without intending any discourtesy to counsel on the other side, we shall not weary the court by any attempt to follow them in their elaborate brief of questions that we believe are entirely foreign to any issue presented by this appeal.

The extended argument of opposing counsel is the result, we presume, of the decision of the court below that there was no such thing as a water right in the appellee, and that threfore it could not convey one. But the court below was not called upon to rule upon any such question and the decision rendered upon that point is immaterial to the matter in controversy. The bill not only conceded, but alleged, in

terms, that the defendants were the owners of water rights, as follows:

"That each of said defendants has by purchase or otherwise become the owner of a water right to a part of the water appropriated and stored by said company necessary to irrigate his tract of land, and is liable to pay for the use of said water a yearly rental, such as said company is entitled to charge and collect."

Record, p. 9.

The question is, whether, having acquired the water right they are still bound to pay reasonable annual rates for the water they use.

There is the further question that we will come to farther on, viz., "*by whom may the annual rates be fixed and how?*"

Under section 552 above quoted, we submit, there can be no question but that the owner of the water right is bound to pay the rates established by the company and that his right was subject to such payment. Let us see then what changes have been made in the law since Section 552 was enacted, and what effect they have on the rights, obligations and liabilities of water companies and their consumers.

The constitution of the state provides:

"The use of all water now appropriated, or that may hereafter be appropriated for sale, rental or distribution, is hereby declared to be a public use and *subject to the regulation and control of the State in the manner to be prescribed by law.*"

And again:

"*The right to collect rates or compensation for the use of water* supplied to any county, city and county or town *or the inhabitants thereof is a franchise* and cannot be exercised *except by authority of and in the manner prescribed by law.*"

Const., Art. XIV, Secs. 1, 2.

These constitutional provisions undoubtedly confer upon

the state the power to regulate the price to be charged for the use of water.

Spring Valley Water Works v. Schottler, 110, U. S. 347;
San Diego Land and Town Company v. National City, 174 U. S. 739, 753;
San Diego Water Co. v. City of San Diego, 118 Cal. 556.

The right of the state to regulate the sale and distribution of water by Companies of this kind being established, and the constitution having declared the use of water to be a public use, subject to regulation "in the manner prescribed by law," and that the right to collect rates is a franchise that cannot be exercised except as "prescribed by law," we must next inquire what has been prescribed by law in the way of regulating the use, sale and distribution of water. This becomes necessary because counsel contend: 1. That notwithstanding these constitutional provisions, and statutes enacted in pursuance of them, water companies and their consumers may, by private contracts, determine how this franchise shall be exercised and thus take away, entirely, the power of the state to regulate and control it as prescribed by law; and, 2. That if a water company when it commences the business of supplying water establishes a rate for irrigation, that rate must stand forever, however unjust or unreasonable it may be, or however ruinous to the company, unless twenty-five citizens see fit to appeal to the state authorities to change the rate. If this be so then the company and its consumers can, by their own acts, abrogate the constitution and statutes of the state and take away absolutely and forever the power of the state to regulate the sale and distribution of water. 3. That in this case the company is estopped to increase its rate because it sold lands on the representation that water would be furnished at $3.50 per acre per annum.

Following the adoption of the constitution vesting in the

state the power to regulate the sale and distribution of water two statutes were enacted in pursuance of its provisions.

Stats. of Cal., 1881, p. 54;

Stats. of Cal. 1885, p. 95.

The first of these statutes applies only to the fixing of rates, annually, in cities and towns. It applies, also, to "cities and counties," to include San Francisco, which is a city and county government in one. This statute has nothing to do with the fixing of rates by boards of supervisors for the irrigation of lands outside of cities and towns. To cover such rates the latter of the statutes above cited was enacted, and by the latter statute this case must be controlled. To arrive at a correct determination of the questions involved here this statute may properly be considered with some care.

It should be remembered that before the passage of this act, the power to fix rates rested solely in the water company supplying the water, by virtue of Civil Code, Sec. 552, and the water right acquired by a water consumer was subject to the payment of rates so fixed. This might result in the imposition of oppressive rates from which no relief was provided by statute. In this condition of things, and for the protection of such consumers, the statute of 1885 was enacted. It provides, as follows:

"The use of all water now appropriated, or that may hereafter be appropriated, for irrigation, sale, rental, or distribution, is a public use, and the right to collect rates or compensation for use of such water is a franchise, and except when so furnished to any city, city and county, or town, or the inhabitants thereof, shall be regulated and controlled in the counties of this state by the several boards of supervisors thereof, in the manner prescribed in this act."

Stats. Cal., 1885, p. 95, Sec. 1.

This provision is followed by others authorizing boards of supervisors to fix and establish the rates upon the petition of "not less than twenty-five inhabitants who are tax-payers of any county," and fixing the basis upon which the rates

shall be made and the amount to be returned to the company thereby, "not less than six nor more than eighteen per cent upon the value" of its plant and system.

Stats. 1885, pp. 95, 96, Secs. 2-5.

It will be observed that the right to call for the fixing of rates is given to the consumers and other inhabitants and tax-payers alone. No such right is given to water companies.

For this reason, doubtless, and because the power to fix and change its own rates already rested with the company, by virtue of Section 552, of the Civil Code, above quoted, this further provision is contained in the statute:

"And until such rates shall be so established, or after they shall have been abrogated by such board of supervisors, as in this act provided, *the actual rates established and collected* by each of the persons, companies, associations and corporations now furnishing, or that shall hereafter furnish appropriated water for sale, rental or distribution to the inhabitants of any of the counties of this state, *shall be deemed and accepted as the legally established rates therefor.*"

Stats. Cal., 1885, p. 97, Sec. 5.

It must be evident, from these provisions of the statute, that until action is taken by the board of supervisors, at the instance of inhabitants of the county, who alone can petition therefor, the power to regulate the rates is vested in the company as provided by the code. And this power is subject, only, to the action of the board of supervisors in the manner provided by the statute.

But, notwithstanding these plain provisions, counsel claim 1st, that the rates may be irrevocably fixed by the parties immediately concerned, viz.: the company and its consumers, by private contract between them, and, 2nd, that the company having once established a rate its power is exhausted and the rate so established by it must stand forever unless some one else, over whom it has no power or control, shall

procure the rate to be changed by the board of supervisors.

Let us examine these two propositions briefly:

(*a*) *May the rates be established by contract.*

That the state may regulate the sale, rental or distribution of water must be taken as definitely and finally settled. And this regulation extends to the fixing of the rates at which the water shall be supplied. The state *has* prescribed such regulations. The statute provides two ways in which rates may be established, viz.: by the company and by the board of supervisors. The provision that until the board of supervisors fixes the rates and after it has abrogated them the rates established and collected by the company "*shall be deemed and accepted as the legally established rates therefor*" is just as much a regulation of the rates and the manner of fixing them as the provision that the rates may be fixed by the board of supervisors, and when fixed by the board shall be binding until abrogated. The statute provides, in unqualified terms, that the rates fixed in either of the ways authorized by it *shall be accepted as the "legally established rates."*

Then, we ask, how can the rates be fixed and established in any other way? It is impossible that this should be so. If it is so the power of the board of supervisors may be entirely abrogated and taken away, at the will of the company and its consumers. But it must not be overlooked that the right to call upon the board of supervisors does not rest with the parties taking water from the company, alone. It is a matter of public concern and the right to move in the matter is given to any twenty-five inhabitants and tax-payers. Such inhabitants, not takers of water, may desire to become such and to have the rates so fixed as to warrant them in applying for the use of water. And, aside from this, the statute provides for but two modes of fixing the rates, as we have stated, and that such rates shall always be open to change in

such way as to make them at all times reasonable and just.

Further, the statute provides, in terms, that the rates established shall, as to each class of purposes for which the water is to be furnished, "*be equal and uniform.*" And it is absolutely essential that the rates shall be uniform as to all consumers taking water for like purposes. If the right to fix the rates by private contract exists, the rates may be made different in each case and for each person contracted with, which would be in violation of the very essence and spirit of the law.

But it seems to us to be wholly unnecessary to dwell upon what is the evident purpose and intent of the legislation of the state on this subject. It should be enough to say that the asserted right to fix the rates by private contract is in direct opposition to the plain and unequivocal terms of the consitution and statutes. The reasoning of the learned judge of the court below on this branch of the case is unanswerable.

Lanning v. Osborne, 76 Fed. Rep. 336-339.

(*b*) *No contract fixing or attempting to fix rates, was ever made between the appellants, or either of them, and the appellee.*

We have, under the last preceding subdivision, argued the question upon the assumption, indulged in by opposing counsel, that the appellee did make some contract respecting the rates to be charged by it. But in fact no such contracts were ever made. On the contrary, the parties acted upon the theory, in making their water right contracts, that the rates for the water to be furnished must be established as prescribed by law. The answer of the defendants, to which exceptions were sustained, set up three forms of contracts made

by the appellee with certain of its water consumers, for water rights.

Record, pp. 21, 22, 23.

Lanning v. Osborne, 76 Fed. Rep., 326, 327.

In none of these contracts, and none other is alleged to have been made, did the parties assume or attempt to fix or control, in any way, the rates to be paid. Not only so, but in each instance they recognized the right of the company to fix the rates and obligated themselves to pay the rates so fixed.

In the general form of water right contract set up in the answer the consumer bound himself to pay a certain sum for the water right and with respect to the annual rates, obligated himself as follows:

"And he will promptly pay all *annual water rates and charges* for the water to which he is entitled under and by virtue of this agreement, *at rates fixed by the party of the first part as allowed by law*, and at the times, in the manner and according to the rules and regulations made and adopted by the party of the first part."

Lanning v. Osborne, 76 Fed. Rep., 326.

In the case of J. M. Ballou the agreement was to pay the *current rate therefor as established for Chula Vista*, which was covered by the general contract above alluded to.

Same, p. 327.

In the case of the 400 acres in the ex-Mission the contract was to "*pay for the use of the water at the current rates as may be enforced from time to time for supplying lands in National Ranch and subject to the same general rules and regulations.*"

Same, p. 327.

National Ranch was a part of the territory covered by the system of the appellee and includes Chula Vista. The purpose of these two special contracts was to make the rates

of the contracting parties uniform with all other consumers of the company.

We submit that not only is it not true that there was any contract which could be so construed as to prevent the appellee from collecting the rates fixed by it, but that it was expressly and in terms agreed, in every instance, that the company should fix the rates and the consumer would pay them in addition to the amount agreed upon to be paid for the preferred right to the water.

It must be conceded, in our view of the law, and the view taken of it by the court below, that this clause in the contract added nothing to the right already existing in the company by law. It had the right and power, in the absence of any action by the board of supervisors, to fix its own rates and the consumers were bound to pay them until the board of supervisors did establish rates. But the clause very effectually disposes of the claim of counsel that the purchase of and payment for the water right had the effect to reduce the amount to be paid as annual rates for the use of the water. Not only is it true that such an agreement could not have that effect, as matter of law, if nothing had been said in the contract on the subject, but the parties actually contract in express terms that it shall not have any such effect, but that in addition to the amount agreed to be paid for the water right the regular annual rates fixed as provided by law shall be paid.

(c) *The rate of $3.50 established by the Company was subject to be changed by the company.*

The contention of counsel is that the company having once established the rate of $3.50 per acre per annum, its power was thereby exhausted and the company could not change the rate, however disastrous it might be to the company or unjust to the consumers. The allegations of the bill are that the company established this rate under the

advice of its engineer that the system would supply twenty thousand acres of land, but that actual experience had demonstrated that the duty of the system was not in excess of seven thousand acres.

Record, p. 10.

The allegation of the answer is that the system will supply about nine thousand acres.

Record, p. 16.

The bill further shows that at the rate of $3.50 per acre the company cannot pay its operating expenses, but is constantly losing money.

Record, p. 10.

The policy of the law is that a company of this kind shall receive reasonable rates.

Spring Valley Water Works v. San Francisco, 82 Cal, 286;

San Diego Land and Town Company v. National City, 174 U. S. 739.

The cases cited relate to the rates to be fixed annually in cities and towns, where the law does not provide what amount of revenue shall be returned to the company by the rates. In this case the statute, by its terms, provides just what shall, as matter of law, constitute reasonable rates. The bodies fixing the rates are positively required to so fix them as to return to the company net annual receipts of not less than six nor more than eighteen per cent on the value of its plant.

Stat. 1885, p. 96, Sec. 5.

This court has lately held, in a case involving the rights of this same company, that the rates must be based upon the present value of the plant of the company and the value of the services to the consumers, taking into account the cost of the plant, the cost per annum of operating the plant, including interest paid on money borrowed and reasonably

necessary in constructing the same, and the annual depreciation of the plant.

San Diego Land and Town Company v. National City, 174 U. S. 739. 757.

The bill here alleges that the appellee's plant cost it $1,022,473.54; that its annual operating expenses, including interest on $300,000 of outstanding bonds, and not including the depreciation of its system, is $33,034.99; and that its total income from all sources, outside of National City, is $13,000, and from National City $10,715, making the total receipts $23,715.00, as against operating expenses and fixed charges of $33,034.99, or a net loss per annum of $9,319.99.

The answer alleges that the value of the plant used for supplying water for irrigation is of the value of $300,000; that the receipts of the company were $25,715.00, that its operating expenses were not to exceed $12,034.99, excluding the interest on its bonds. This would leave the company, according to the allegations of the answer, but $13,680.01 with which to meet the interest of $21,000 per annum that it was compelled to pay as interest on its bonds. And this does not cover its loss by the depreciation of its plant, that must be made good to save the company from loss. The statute, as we have shown, provides that the company shall be allowed not less than six per cent, net, on the value of its plant. Taking the figures of the answer putting the value at $300,000, which is unreasonably low, six per cent would be $18,000. The operating expenses, admitted in the answer, were $12,034.99. The amount to which the company would be entitled at the lowest rate permitted by the statute would be $30,034.99. And the company is paying $21,000 as interest on its bonds that is not met by the rates received. It appears, therefore that there was an absolute necessity for a change in the rates of the company.

But it seems to us to be a waste of time to discuss the

reason or necessity for making the change. It is so perfectly evident that the law contemplates that the company shall have the right to make and change its rates as to make any such discussion unnecessary and idle. As we have seen the code and the statute give the company this right, and the statute provides that until the board of supervisors establishes a rate, and after it has abrogated a rate once established by it, the rates established and collected by the company shall be the legal rates. The law clearly contemplates that it will be necessary to change and re-establish rates from time to time, however they may be fixed. Therefore it is provided by the statute that at any time after one year either the company or citizens and tax-payers may petition to have the rates changed.

Stat., 1885, p. 97, Sec. 6.

The reason for this is evident. The rates must be fixed, as this court has held, on the present value of the plant.

San Diego Land and Town Company v. National City, 174. U. S. 739.

The value of the plant, and the cost of operating it, may and necessarily does, change materially from year to year. And as the courts have construed the statute as requiring the fixing of rates on the basis of present value, the provision of the statute that the rates may be changed at intervals of not less than one year is obviously in harmony with the general purpose of the law. And it is just as obvious that the intention of the law is that until the rates are fixed by the board of supervisors the company may vary and change its rates in such way as to make them just and reasonable, because the company is not allowed to make application to the board of supervisors to establish the rates. And the consumers are protected, fully, by the right to have the rates established by the supervisors whenever the company shall attempt to enforce unreasonable or unjust rates. This view of the law

is very clearly declared in the opinion of the learned judge of the circuit court in this case, as follows:

"Since, to make good the appropriation, it is essential that the water be applied to some beneficial use, these provisions of the statute of themselves necessarily presuppose that, until the action of the board of supervisors is called into play, the parties furnishing the water must designate the rates. It cannot be furnished for nothing. The law does not exact that, nor has any consumer the right to expect it The statute evidently proceeds upon the theory that the rates charged by the person, company or corporation may be satisfactory to the consumers; in which event there would be no occasion for the intervention of the board of supervisors. But, to protect the consumers in the event such charges should be unsatisfactory, they, and they only, are given the right to first invoke the intervention and action of the board. Until that time, the rates established and collected by the person, company, or corporation furnishing the water prevail. This, it seems to me, would be the true and obvious construction of the statute if it had not so declared in terms. But the statute iself does so declare in terms, and in these words:

" 'Until such rates shall be so established (namely, those first established by the board), or after they shall have been abrogated by such board of supervisors as in this act provided, the actual rates established and collected by each of the persons, companies, associations, and corporations now furnishing or that shall hereafter furnish appropriated waters for such rental or distribution to the inhabitants of any of the counties of this state, shall be deemed and accepted as the legal rates thereof.' Act Cal., March 12, 1885, Sec. 4.

"Should the rates fixed by the board designated by the law for the purpose be so unreasonable as to justify the interposition of a court, any party aggrieved would have his remedy in the appropriate court, by which such unreasonable rates would be annulled, and the question again remitted to the body designated by the law to establish them. But in no case would the court undertake to do so. Reagan v. Trust Co., 154 U. S. 420, 14 Sup. Ct. 1062; Railway Co. v. Wellman, 143 U. S. 339, 12 Sup. Ct. 400; Santa Ana Water Co. v. Town of San Buena Ventura, 65 Fed. 323. Therefore it is not for the court in the present case to go into the question of the reasonableness of the rates established by the complainant, and which it seeks to enforce. If unreasonable, and the consumers are for that reason dissatisfied therewith, resort must

first be had to the body designated by the law to fix proper rates, to-wit, the board of supervisors of San Diego county."

It seems to us that the position taken by the court below on this point is incontestable.

It is inconceivable that it should have been intended by the law makers that there should be no relief for a company that had once fixed a rate that must result, if not changed, in the absolute financial ruin of the company, as was the case here, and the ultimate defeat of the purpose sought to be accomplished, and deprive the consumers of the service to which they had become entitled. But it is hardly necessary to reason about the intention of this legislation when the purpose of the law is so obvious from its express provisions.

(*d*) *The Company was not estopped to change its rates.*

Of course, if the company could not legally bind itself to any fixed and unchangeable rate by contract it could not do the same thing indirectly by representations claimed to work an estoppel against it. But it was maintained, in the court below, and is urged here, that because the company sold land, with water, upon the representation that water would be furnished at $3.50 per acre per annum, it must furnish it at that rate forever, whatever might be the consequences. The court below disposed of this point in the following language:

"As the water in question, from the moment the appropriation became effective, became charged with a public use, it was not in the power of either the corporation making the appropriation or of the consumers to make any contract or representation that would at all take away or abridge the power of the state to fix and regulate the rates. All persons are presumed to know the law, and those who bought lands from the complainant corporation upon its representations that water for irrigation would be furnished at the annual rate of $3.40 an acre, or otherwise acted or contracted with reference to such rates, must be held to have known that the constitution conferred upon the legislature the power, and made it its duty, to prescribe the manner in which such rates

should be established. This the legislature has done by the act of March 12, 1885. As by that act the legislature deemed it proper to allow the action of the board of supervisors to be invoked in the first instance only by twenty-five inhabitants, who are tax-payers, of the county, and until then to leave the designation of rates to the person, company or corporation furnishing the water, to hold valid and binding any contract between parties with reference thereto would be, in effect, to ignore and set aside the provisions of the statute upon the subject; for it is plain that a contract must bind all of the parties to it, or it binds none; and, if binding at all, its manifest effect would be to remove from the regulation of the state the rates in question, and leave them to be governed and controlled by private contract, or such representation and acts as may amount to the same thing. No company or corporation charged with a public use can be estopped by any act or representation from performing the duties enjoined on it by law. It will hardly be contended that the defendants, by reason of any of the express contracts pleaded in defense of the suit, or of any contract growing out of the representations alleged to have been made by the company, would be estopped from applying to the board of supervisors of the county for the establishment of rates. The case, in truth, affords no basis for the operation of an estoppel against either party; which, to be good, must be mutual. Litchfield v. Goodenow's Adm'r, 123 U. S., 549, 8 Sup. Ct. 210."

This very clear and unanswerable statement of the law, and the reason for it, leaves nothing to be said on this point. But the actual history of this very company will show the absurdity of any such construction of the statute as counsel contend for. After fixing the rate of $3.50 per acre the company found it necessary, in order to supply the water it had to its consumers, to put in a new and additional main pipe line at a cost of $65,000.00, and to expend several thousand dollars more in the improvement of its dam, by which its water was stored. Besides, as the plant grows older the expenses of keeping it in repair must, in the nature of things, increase year by year. Therefore, if counsel are right, the company can receive no return on the large amount it has necessarily expended in enlarging and improving its plant

for the benefit of its consumers, or for its increased operating expenses, because it has, before making these expenditures, fixed a rate that can never be changed, or represented that the rate would be $3.50 an acre, by which it is forever estopped to change the rate. There is, however, another and unanswerable reason why this claim of estoppel cannot prevail, if counsel are right in their contention that this is a matter of private contract. If it is the appellants are bound by their express contracts to pay the annual rates fixed by the company. The several contracts made by the appellants are referred to and commented on above. By their contracts they expressly agree to pay the rates as stated. If so no representations made by the company as to the rates it would charge, or was charging, could estop it to enforce the written contracts made, which give it the right to fix the rates. If, on the other hand, our contention is the correct one, that it is not a matter of contract at all, then of course there can be no estoppel.

(*e*) *The Statute of Limitations does not affect the question.*

It is contended that because the rate of $3.50 per acre has been in force for five years the consumers have become vested with the right to the use of the water at that rate by virtue of the statute of limitations. We hardly think this point can be seriously made. It is certainly something entirely new and original. Either the company has the power to change its rates or it has not. If it has there is no limitation as to the time when it may do so. If it has no power to do so there could not be a running of the statute of limitations which can only occur when a party has the right and power to do a thing, but fails to exercise that right within the time limited by the statute.

THE POWER GIVEN THE STATE TO REGULATE THE SALE OF WATER IS NOT IN VIOLATION OF THE CONSTITUTION OF THE UNITED STATES.

It is claimed that if the constitution of California gives to the state the power to say what rate a water company shall charge it is in violation of the constitution of the United States because it takes away from the company and its consumers the right to contract what the rates shall be. This is a claim that, so far as we know, has never before been made by the consumers of water, for whose benefit alone the state constitution and statutes were framed and enacted. The claim has been made by the water companies but the courts, both state and federal, have uniformly ruled against it. So firmly has the right been established that we need do no more than cite the very latest decided cases on the subject where it is treated as fully and finally settled.

San Diego Land and Town Co. v. National City, 174 U. S. 739.

San Diego Water Co. v. San Diego, 118 Cal., 556.

THE ALLEGATIONS OF THE ANSWER EXCEPTED TO WERE BOTH INSUFFICIENT AND IMPERTINENT.

If the court below was right that the rates could only be fixed as prescribed by law, that they could not be fixed by private contract, or estoppel, or by prescription, but that if the rates fixed by the company were not satisfactory the only and exclusive remedy of the consumers was an application to the board of supervisors, it follows, necessarily, that an answer setting up alleged contracts, matters of estoppel, facts tending to show that the rates fixed by the company were unreasonable and the statute of limitations are both insuffi-

cient and impertinent. And upon either ground exceptions would lie.

Beach Mod. Eq., Secs. 406-420.

We submit that we have shown that the court below was right in the conclusion that the fixing of rates was not a matter of contract between the parties, and that the company could not be estopped by representations or lapse of time. It is equally clear that the court was right in holding that the remedy of the consumers, if not satisfied with the rates, was to apply to the board of supervisors to establish rates. This is the remedy given by statute. None other is provided for. The board of supervisors has exclusive jurisdiction over the question of fixing rates. The learned judge of the circuit court, after citing cases holding that the courts have no power or jurisdiction to fix rates, says:

"Therefore it is not for the court, in the present case, to go into the question of the reasonableness of the rates established by the complainant, and which it seeks to enforce. *If unreasonable, and the consumers are for that reason dissatisfied therewith, resort must first be had to the body designated by the law to fix proper rates, to-wit: the Board of Supervisors of San Diego County.*"

Lanning v. Osborne, 76 Fed Rep., 319, 336.

It is undoubtedly the law that where a court is specially designated, by statute, as the tribunal vested with jurisdiction in a given action or proceeding, resort must be had to that court, at least in the first instance.

Case of Broderick's Will, 21 Wall. 503.

The purpose of the bill was not to have it determined that the rates fixed by the company were reasonable, but to have the right of the company to fix its own rates established, and

to prevent a multiplicity of suits by individual consumers to compel the company to supply water at the old rate.

Lanning v. Osborne, 79 Fed. Rep., 657.

And the court below rendered no decree affecting the question of the reasonableness of the rates.

Record, pp. 64, 66.

If we are right in our view of the law, as it was declared by the circuit court, the allegations of the answer, to which exceptions were sustained, were both insufficient and impertinent. And this being decided, and the one and only thing that could have been a sufficient answer, viz., that the appellants, or others competent to do so, had applied to the board of supervisors and had rates fixed, not having been shown by the answer, and the defendants declining to answer further, the complainant was entitled to the decree pro confesso given it by the court. Counsel complain that the remedy pointed out by the statute is not adequate because it would take time to have the rates fixed by the board of supervisors and the consumers might be compelled to pay the rate fixed by the company in the meantime and it might not be possible to secure the necessary twenty-five to petition for a change of the rates. But it is enough to say that this is the sole and only remedy provided by law, and the courts cannot supply another remedy that might seem better to the complaining party. Besides, in this case the assumed hardship of inadequacy of the remedy is purely imaginary. The statutory remedy is summary in its nature and may be brought to a hearing in four weeks.

Stat. Cal., 1885, p. 95.

And the company had, months before the new rate was to take effect, notified all of its consumers that it would go into effect the first of the following January. This was before the

appointment of the receiver and the receiver was appointed September 4th, 1895.

Record, p. 8.

This was nearly three months before the new rate was to take effect.

Record, p. 11.

And, as there were two hundred or more consumers, complaining of the new rates, it would not have been difficult, we presume, for them to find twenty-five petitioners for the establishment of rates by the board of supervisors. But they chose rather to contest their right to a $3.50 rate, to the end, on the ground that neither the company, nor the board of supervisors had any power to change that rate. They did later, secure rates to be fixed by the board of supervisors and undertook to have this suit dismissed on the ground that rates had been so established and supported their motion by an affidavit of one of their counsel.

Record, p. 63.

So, their complaint that it was a hardship to compel them to resort to the remedy provided by statute, or that such remedy was inadequate, has no more force in fact than it has in law.

Counsel cite many authorities to support the position that a water right is property and may pass by contract. As we have said we do not dispute this contention, and it was in no way in issue in this suit. But the court will find that the cases relied upon as supporting the further contention made by counsel that an interest or ownership in the pipe line or system, by and through which the water is supplied, may be owned and conveyed, are cases involving private water rights and ownership, in private pipe lines or ditches.

Hayes v. Fines, 91 Cal., 391;

Standart v. Round Valley Water Co., 77 Cal. 399;

Fudicker v. East Riverside Ir. Dist., 109 Cal., 29, 36.

But it cannot be possible that a consumer taking water from a corporation dealing in water, as a public use, under the state constitution, can become a joint owner with such a *quasi* public corporation in the plant that is being used for the public good, as a public franchise, and under state regulation and control. Such an idea is wholly repugnant to the purposes and objects of the constitution and statutes of the state and if enforced would be entirely subversive of all legislation of the state enacted for the purpose of protecting water consumers from private monopolies and the enforcement of unjust and oppressive rates for water.

Counsel see proper to criticise the construction given by the court below to the constitutional and statutory provision, for the regulation of rates because, as they claim, it vests in the corporation power to change and increase its rates without limitation, while the board of supervisors are hedged in by statutory provisions limiting its powers as to the rates to be fixed. But this criticism is unfounded and unjust. There is a speedy and effectual remedy, if the company fixes unreasonable rates, by resort to the board of supervisors. Therefore, such rates are not permanent or binding, but may be set aside at any time as provided by the statute. On the other hand, the rates fixed by the board of supervisors are absolutely binding on all parties concerned, for at least one year, subject only to be set aside by a court of equity on the ground that they are so unreasonable as to violate the constitutional rights of the parties or one of them.

Stat., Cal., 1885, p. 97.

So there is no injustice or wrong in allowing the company to fix its own rates subject to the safeguards and remedies provided by the constitution and statutes of the state.

Touching this question, the learned judge of the court below says in his opinion:

"The statute evidently proceeds upon the theory that the rates charged by the person, company, or corporation, may be satisfactory to the consumers; in which event there would be no occasion for the intervention of the board of supervisors. But, to protect the consumers in the event such charges should be unsatisfactory, they and they only, are given the right to first invoke the intervention and action of the board. Until that time, the rates established and collected by the person, company, or corporation furnishing the water prevail. This, it seems to me, would be the true and obvious construction of the statute if it had not so declared in terms. But the statute itself does so declare in terms."

After this case was decided by the court below on exceptions to the original answer and as a result of that decision, counsel for the defendants framed and had passed by the legislature an act intended to nullify both the decision of the court and all previous legislation on the subject by preserving, if the constituion would allow it, the right to fix the rates by private contract.

Stat., Cal., 1897, p. 49.

Having procured this amendment they pleaded it in their amended answer.

Record, p. 37.

As to the effect of this amendment we feel that we need do nothing more than cite the opinion of the court below relating thereto.

Lanning v. Osborne, 82 Fed. Rep., 575.

But the court might have gone further and held, in accordance with the facts, that no contract was ever made between the parties to this suit fixing the annual water rates to be paid, but on the contrary, as we have shown above, the contracts, in every case, obligated the defendants to pay the rates fixed by the company. Therefore, this amendment was entirely inoperative, so far as the parties to this suit are concerned, because the contract to pay rates fixed by the company "as allowed by law," was subject, always, to the existing statute authorizing the board of supervisors to es-

tablish new rates. However, the reasons given by the court below for holding the statute to be inoperative, were amply sufficient.

It is unnecessary to follow counsel in the discussion of the sufficiency of the reasons given by the complainant, in its bill for increasing its rates, as the court below very properly held that the reasonableness of the rates was not in controversy and no decree was given thereon. It must be obvious that the reasons for making a change in the rates are immaterial unless the court below was wholly wrong in the conclusion it reached that by the terms of the statute the company was given the right to fix its own rates, subject only to the right of the consumers, or other citizens, and tax-payers, to have the same set aside and new rates established by the board of supervisors.

If the court was wrong in that conclusion, on any of the grounds urged by counsel, then, also, the reasons for increasing the rates are unimportant because the company, if counsel are right, had no power to change its rates at all or for any reasons.

THE COURT BELOW HAD JURISDICTION OF THE CAUSE.

Counsel make the point that the Circuit Court had no jurisdiction, and attempt, in a very feeble way, to support the point by argument. This same point was made in the court below and fully argued. The reasoning of the judge of the circuit court, in the opinion relating to this question, and the grounds upon which the jurisdiction was upheld, are conclusive and need no supporting argument from us.

Lanning v. Osborne, 79 Fed. Rep., 675.

Again, it is urged that the appellee in whose favor the decree pro confesso was rendered, was not properly a party to the suit, or entitled to a decree in its favor, and that having been made a party, an original bill in its behalf was necessary.

But the appellee was not a new party asserting an original cause of action on its behalf. It had purchased the property and rights of the old San Diego Land and Town Company. It stood in precisely the same position that the old company would have occupied if the receiver had been discharged, without a sale of the property, and a return of the property to it. The receiver was no more than the holder of the property for the company and its creditors. Upon a sale of the property by the receiver, to the new San Diego Land and Town Company, it was entitled to take the place occupied by the receiver in the suit. The appellee came into the case after it had gone beyond the stage when pleadings were necessary or proper, and the receiver was entitled to a decree. When the appellee was substituted it was in the place of the receiver and with the right to proceed as the receiver could have proceeded.

Proper proceedings were taken for the discharge of the receiver and the substitution of the owner of the property.

Record, pp. 60, 61, 62.

After which notice was given, by the substituted complainant, that it would move for an order that the bill be taken pro confesso, in its favor, which was done, and the order made after a hearing, at which the defendants appeared.

Record, pp. 62, 63.

The defendants, having already defaulted, took no steps to be relieved of such default, and did not ask leave to answer further because of the substitution of the appellee.

And it is recited in the decree that the appellee was substituted as complainant by order of the court, and an order made that a decree pro confesso be entered in its favor.

Record, p 66.

So the appellee was connected with the record and decree in the most direct and proper way, as appears from the enrolled papers.

If the appellants desired to test the right of the substituted complainant to a decree, by the allegation of any new matter affecting it and not applicable to the complainant receiver, they should have asked leave to plead further. Not having done so the substitution of the appellee, upon a showing that it had succeeded to all of the rights of the receiver, including the right to the decree to which the receiver was then entitled, as of course, was all that was necessary.

In conclusion we have to say that in our demurrer to the bill of review we made the point that a bill of review is not the proper remedy in a case of this kind, but the party must resort to the remedy provided by statute, viz., an appeal.

Record, p. 86.

We also moved to strike the bill from the files on the ground that the decree sought to be reviewed and set aside had not been performed by paying the back water rates adjudged to be due the complainant.

Record, p. 79.

But it is more important to all parties concerned that the important questions presented by this appeal should be speedily and forever settled than that the present appeal should be defeated on technical grounds. And for that season we do not press these points.

All of the questions presented by this appeal were fully argued in the court below, and received the most careful and conscientious consideration of the learned judge of that court whose learning and ability, and familiarity with the questions involved, are so well known that in many instances we have, instead of entering upon an extended argument of the points made by counsel on the other side, contented ourselves by citing the opinion rendered in the court below. We have not done this out of any want of appreciation of the arguments of opposing counsel, but because we felt that the

opinions of the court below fully covered the ground and needed no support from us, and that to undertake to argue the questions would burden this court unnecessarily. The importance of the questions involved here can hardly be overestimated. As we view them it is the simple question whether the state of California can and has provided for the regulation of the supply of water to its inhabitants by corporations that have procured the right, by appropriation, to divert the waters of the running streams of the state, or whether the corporation may still take away, entirely, the power of the state to exercise any such control by contracting with its consumers in such way as to fix its rates for all time to come. Doubtless such a construction of the law would be entirely satisfactory to the water companies, as they are the parties against whom state legislation looking to such state control has been directed, and who are the sufferers by the manner in which such control is exercised. And the course of the consumers, in this particular instance, in attempting to enforce their construction of the law, because they think the rates alleged to have been fixed by contract are the best that can be had, is eminently selfish and exceedingly unwise. No doubt the rates claimed to exist here are unjust and ruinous to the company, and advantageous to the consumers, so long as the company can survive and supply water at such rates, which cannot be for long. But if the company and its consumers can fix the rates, to exist forever, in one case, the right must exist in all cases, and if rates, unjust and ruinous to the consumers, can be established by contract, and the board of supervisors have no power to revise or change them, then the very objects and purposes of the laws of the state, enacted to protect water consumers from just that thing, are defeated, and these beneficial laws must go for naught.

We cannot believe that any such conclusion can be reached

by the courts. It is impossible without overturning, completely, all of the legislation of the state on this important submit.

We respectfully submit that there is no error in the record.

Respectfully submitted,

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